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National Association of Regulatory Utility Commissioners

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Office of the Secretary
Federal Communications Commission
445 12th Street SW, Suite TW-8B115
Washington, DC 20554

Re: NOTICE OF MULTIPLE ORAL AND WRITTEN (E-mail) EX PARTE COMMUNICATIONS - Two copies Filed in the proceeding captioned: *Triennial Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; CC Docket No. 96-98; and CC Docket No. 98-147

Dear Secretary

This notice of oral ex parte contacts is meant to cover a series of contacts between NARUC member commissioners and FCC Commissioners that occurred last week. NARUC respectfully requests any waivers needed to make this filing out-of-time.

A. TUESDAY AFTERNOON, JANUARY 21, 2003:

NARUC President David Svanda met individually with **FCC Chairman Powell**. On Friday, January 24, 2003, he met individually with **FCC Commissioners Martin, Adelstein, and Copps**. During these meetings President Svanda discussed the status of the CLEC-ILEC collaborative discussions. He also made one or more of the points listed below concerning the critical need for a strong and flexible state role with respect to any item migrating off of any presumptive national list of unbundled network elements.

B. TUESDAY MORNING, JANUARY 21, 2003:

Commissioner Kevin Martin came to New Orleans to provide a very useful overview of the FCC's planned and on-going proceedings that might be of some concern to NARUC's State commissioner members. NARUC's research affiliate, the National Regulatory Research Institute, typically holds a state commissioners-only summit each year to discuss all energy, water, and telecommunications issues facing state regulators. Attendees included the following NARUC Commissioners: **Bob Anthony, Glenn Arthur, James Atkins, Ave Bie, Denise Bode, Jim Burg, Michael Callahan, Tony Clark, Richard Conder, Dough Everett, Steve Fetter, Jeanne Fox, Robert Garvin, Thomas Gertz, Gary Gillis, Connie Hughes, Martin Hulsmann, Judy Jones, Lorinzo Joyner, Robert Kcating, James Kcrr, Lorretta Lynch, Arnetta Mcrae, Brian Moline, Diane Munns, Carol Murphy, Robert Owens, Anthony Rachal II, Judith Ripley, Bob Sahr, Tom Schneider, Marilyn Slrowalter, David Smith, Robert Spurlin, David Svanda, Aaron Wilson, Stan Wise, and Carl Wood.**

During Commissioner Martin's presentation to the gathered commissioners, there were numerous bipartisan State Commissioner comments thanking Commissioner Martin both for coming to New Orleans and for his public statements before Congress and elsewhere on the importance of a significant state role with respect to the Triennial Review and additions/subtractions from the national required unbundled elements list. Implicit in those commissioner questions, and explicit in their related directives

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statements, was an emphasis on the critical importance of a strong state role and for a requirement for a state granular analysis involving economic, operational, and other public interest findings before any element is removed from the national list.

Both before and after his presentation, **Commissioner Martin** had several individual commissioner-to-commissioner interactions with **Washington UTC Chairwoman Marilyn Showalter, Ohio PUC Commissioner Judy Jones, California PUC Commissioner Loretta Lynch, and Iowa Utilities Board Chair Diane Munns** where basically the same points were emphasized.

C. WEDNESDAY, JANUARY 22, 2003:

Commissioner Loretta Lynch spoke with **FCC Commissioner Jonathan Adelstein** about the Triennial Review case. She discussed the importance of leaving to the states the determination of which UNEs are required to be made available. She also discussed the importance of retaining line sharing to broadband competition in California.

D. THURSDAY, JANUARY 23, 2003:

NARUC's General Counsel either spoke with or left voice mail/written messages for all of the FCC Commissioners' legal advisors concerning NARUC's views in the wake of the circulation of the Chairman's draft order. In one or more of those messages/conversations, Mr. Ramsay re-emphasized NARUC's positions as outlined below.

E. FRIDAY, JANUARY 24, 2003:

North Carolina Chair JoAnne Sanford left voice mail for FCC Commissioner Kevin Martin covering one or more of the points listed below. NARUC's General Counsel spoke briefly with Dan Gonzales and Jordan Goldstein making the same points in an unscheduled encounter at the FCC.

G. MONDAY, JANUARY 27, 2003:

New Jersey Commissioner Connie Hughes and **NARUC General Counsel Brad Ramsay** joined NASUCA and Consumer Federation of America Representatives in a meeting with **FCC Commissioner Kevin Martin and Emily Williford**.

NARUC General Counsel Brad Ramsay Joined NASUCA and Consumer Federation of America Representatives in a meeting with **FCC Commissioner Michael Copps and Jordan Goldstein**. Mr. Ramsay also met separately with Mr. Goldstein. The Ramsay and Hughes visits focused on one or more of the points listed below. The group was unable to schedule time with the other commissioner offices for that day – which coincided with a press event announcing the release of a NASUCA white paper. Copies of the paper were provided by NASUCA to both Martin and Copps offices. NARUC assumes NASUCA will be filing that white paper as part of its ex parte filing.

Oregon Commissioner Joan Smith had a conversation with **Lisa Zaina, Senior Advisor to FCC Commissioner Jonathan Adelstein** covering one or more of the points listed below.

New Jersey Chair Fox sent the following e-mail to **Commissioner Martin**: "I would like to sincerely thank you for taking the opportunity to meet with us last Tuesday in New Orleans at the All Commissioners' meeting. I appreciate your honesty in discussing your feelings on UNE-P and applaud your commitment to allowing states to retain the right to determine the methods that should be deployed to promote local competition. As you are aware, New Jersey has recently concluded a major review of all of its recurring and non-recurring unbundled network element rates. With the new rates in place, New Jersey Competitive Local Exchange Carriers (CLECs) have made a pronounced commitment to entering the local exchange market and to provide service to a much overlooked market segment: residential customers. However, in order to cost effectively serve both residential and small business customers, it is necessary to do so through the unbundled network element platform or UNE-P. As the conclusion of the

Commission's Triennial Review fast approaches, I urge you to protect a state's right to add to or subtract from any list of unbundled network elements that incumbent Local Exchange Carriers (ILECs) must provide and to safeguard the combination of elements known as UNE-P. While facilities-based competition is a laudable goal, I fear that the reality of our troubled economic times likely do not allow the capital expenditures that are necessary for CLECs to construct their own networks at this time. However, with UNE-P, CLECs have the ability to develop a critical mass of customers in a given geographic area. Once the critical mass is achieved, the carrier may then make a proper economic decision to deploy its own facilities. Sincerely, Jeanne M. Fox President, New Jersey Board of Public Utilities

H. TUESDAY, JANUARY 25, 2003:

Several NARUC Commissioners had a conference call with *Chairman Powell*. State Commissioners on the call: *NARUC President David Svanda, NARUC Telecommunications Committee Chair Bob Nelson, Florida Chairwoman Lila Jaber, Oregon Commissioner Joan Smith, D.C. Commissioner Angel Cartagena, Washington Commissioner Marilyn Showalter, Texas Chair Becky Klein, North Dakota Commissioner Tony Clark, New York Commissioner Thomas Dunleavy, Alaska Commissioner Nan Thompson, North Carolina Commissioner Jo Anne Sanford, Maine Commissioner Tom Welch, Massachusetts Chairman Paul Vasington, and Ohio Chairman Alan Schriber.*

ADDITIONAL INFORMATION ON CONTENT OF SOME OF THE REFERENCED CONTACTS:

These contacts, except where otherwise noted, re-emphasized NARUC members' commitment to the tasks Congress assigned to the State commissions and urged the FCC representatives not to limit or restrict the tools available to the States in fulfilling our Congressionally assigned tasks.

NARUC continues to believe that in this environment, the country will benefit from State experimentation. The FCC should follow the suggestions of the recent D.C. Circuit decision and allow States to make the granular analysis needed to see which UNEs are required in their respective markets. State commissions remain focused on the difficult tasks of promoting facilities-based competition as envisioned by the 1996 Telecommunications Act and assuring customers receive better services and more choices at lower prices. NARUC representatives re-emphasized that the FCC and the States cannot accomplish that important economic policy goal without the availability of effective competitive entry strategies such as UNE-P.

STATE FLEXIBILITY TO MAINTAIN LINE-P AS WELL AS THE ABILITY TO ADD TO ANY NATIONAL LINE LIST IS CRITICAL TO KEEPING COMPETITION "ON TRACK."

As a necessary prerequisite to keeping the competition initiative on track, NARUC members support continued State flexibility to maintain the UNE-P as an entry strategy, as well as the ability to add to any national list of UNEs. Any restriction on the State flexibility on this option will negatively impact the growth of local competition. The States have offered the following basic outline as our suggestions for the components of a useful FCC order in this docket.

Elements State Regulators Urge as Components of any FCC Order

(1) NO STATE PREEMPTION:

Any FCC Order should make clear no preemption is intended or should be implied - particularly with respect to additions to the National list imposed by States.

(2) PRESUMPTIVE NATIONAL LIST THAT INCLUDES EXISTING UNE's.

Any FCC list should, at a minimum, include all existing items.

(3) STATE CHECK OFF BEFORE A UNE IS DE-LISTED

Carriers that want to remove an item from the list must make a factual case before a State commission.

(4) TIMING OF IMPACT OF STATE DECISION

Any challenged UNE stays on the required list until State commission makes contrary finding.

(5) CAUCUS WITH STATES NECESSARY PREREQUISITE

FCC should caucus with State commissions extensively before promulgating the "necessary and imminu" standard used to evaluate if a UNE should be available.

(6) STATE AUTHORITY TO ADD UNES CONFIRMED

FCC should confirm its previous ruling that States RETAIN the right to add to the national list after hearing based on State and Federal law.

Additional Content Information

During the Tuesday Commissioner only conference in New Orleans, NARUC's General Counsel also discussed the importance of a state role with Commissioner Martin. Mr. Ramsay pointed out that in the wake of the recent Congressional hearings, NARUC had received inquiries from Capitol Hill on (1) the impact of the DC Circuit issuing its mandate on February 20th and (2) what preemption is required by the text or structure of the Act. In response to those information requests, Mr. Ramsay told Commissioner Martin that he has told those Congressional offices the following:

IMPACT OF DC CIRCUIT ISSUING ITS MANDATE FEBRUARY 20TH

NARUC is very anxious for the FCC to act in this proceeding. There is some concern among some State Commissioners that it may be difficult for the FCC Commissioners to agree on the text of an order in time for the upcoming February 13 agenda meeting— particularly given the short time for comment on the draft, which, at the time of this contact, had not yet been made available to all the FCC Commissioners. However, practically speaking, as long as the FCC is poised to act in some sort of reasonable time frame, nothing is likely to happen if the FCC cannot get an order out by the February 20th date. Notwithstanding the footnote in the FCC request for an extension of the mandate filed with the D.C. Circuit (and what the agency deems the DC Circuit's agreement to the extension to mean), a delay beyond the 20th would have only a limited impact. The most likely impact, some ILECs might seek to initiate further negotiations pursuant to change of law provisions that are part of their either State-arbitrated or State-approved interconnection agreements.

Regardless of what any federal statute says, State commissions can only take action if they are authorized, either by their enabling statute or, in some cases by state constitutional provision, to take that action. All States commissions, by definition, can ONLY act pursuant to state authority. Federal statutes can only give "permission" or, perhaps a more awkward wording, "not preempt" existing state authority. Federal statutes cannot delegate "authority" to act. Two easy examples follow: (1) the federal statute in Section 332 does not preempt State authority over wireless "other terms and conditions" and (2) in Section 214 States are "delegated" (a misleading term) authority to certify companies as essential telecommunication carriers. Even though such oversight over wireless carriers is specifically reserved by the Statute and the Act contains a specific "delegation" of authority in Section 214, a minority of states, as a matter of express exclusions in their state statutes, simply lack any authority with respect to mobile wireless carriers and cannot, AS A MATTER OF STATE LAW, designate such carriers as ETC's "pursuant to" authority "delegated" in the federal statute. Another example is Virginia's refusal to arbitrate interconnection agreements, another responsibility "delegated" by the Act, based on its view that engaging in such activity would require them to waive sovereign immunity – something they have interpreted their STATE authority not to permit.

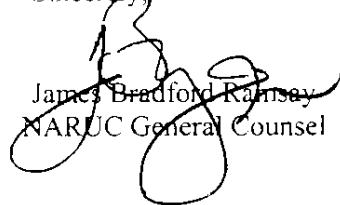
The point is – ALL State actions with respect to the telecommunications – approving SGATS, arbitrations, and interconnection agreements, etc – even where "delegated" (meaning where the State's existing authority to act is not preempted by the federal statute) -- are pursuant to State authority. No one questions that State authority vis-a-vis interconnection authority is "reserved." The only question is the preemptive impact of any FCC rules. If the FCC rules – or any aspect of them – are vacated, the text of the statute is clear that State imposed regulation applies.¹ An assumption that the February 20 release by the DC Circuit of its mandate, as a result of the FCC "footnote", results in vacation of all the FCC rules (as opposed to just line sharing provisions) is legally suspect. But in the aftermath of the mandate, if industry players act on that assumption - proceedings pursuant to ILEC-CLEC interconnection contract "change of law" provisions and collateral attacks on State-ordered or approved interconnection rates or terms require those "preemption" issues to be resolved. NARUC has its own and easily anticipated views on how those should be resolved. but in any case, the FCC is likely to get out an order before any of those state commission or related court proceedings (or carrier negotiations over change of law provisions) could move to completion

PREEMPTION "REQUIRED" BY THE STRUCTURE OF THE ACT

The D.C. Circuit's opinion only requires a granular analysis and some generic reformulation of the statutory language – as it applies to all elements generically. Direct preemption of State-ordered access to any UNE is not required by either the opinion or the terms of the statute. The FCC does have to reformulate the generic statutory test, but nothing requires the FCC to make a final determination of whether an item has to be added or subtracted from the current national list – nor is there any reason to include language that could constrain State authority to act independently to add to the list after the FCC acts.

If you have any questions about this, or any other NARUC filing, please do not hesitate to give me a call at 202.898.2207 or jramsay@naruc.org.

Sincerely,



James Bradford Ramsay
NARUC General Counsel

¹ The 1996 Act expressly *permits* States to impose additional access obligations so long as they are "consistent" with the requirements of 25 l(d)(3)(B) and do not "substantially prevent implementation" of the "requirements" of that section or the "purposes of this part" of the Act (§ 251(d)(3)(C)). Act does not preempt provisions that would support the 1996 Act's goal of "eliminat[ing] the monopolies enjoyed by the inheritors of AT&T's local franchises..., as an end in itself and "giv[ing] aspiring competitors every incentive to enter local retail telephone markets, short of confiscating the incumbents' property." *Verizon Telephone Cos. v. FCC*, 122 S. Ct. 1646, 1654, 1661 (2002).